BOARD OF APPEALS for MONTGOMERY COUNTY

Stella B. Werner Council Office Building 100 Maryland Avenue Rockville, Maryland 20850 240-777-6600

http://www.montgomerycountymd.gov/boa/

Case No. A-6508

APPEAL OF KELLY SUMMERS

OPINION OF THE BOARD

(Hearing held November 30, 2016) (Effective Date of Opinion: December 19, 2016)

Case No. A-6508 is an administrative appeal filed November 2, 2016 by Kelly Summers ("Appellant"). Appellant charged error on the part of Montgomery County's Department of Housing and Community Affairs ("DHCA") in the issuance of civil citation number 5Z36217046. Appellant alleged that the citation "is arbitrary and capricious. The Department of Housing and Community Affairs has no jurisdiction over live trees."

Appellant resides at 3414 Dupont Avenue, Kensington, Maryland 20895 (the "Property"). See Exhibit 3(a).

Pursuant to section 59-7.6.1.C of the Zoning Ordinance, the Board scheduled a public hearing for January 11, 2017. Prior to the hearing, the Board held a pre-hearing conference on November 30, 2016, the subject of which was pre-hearing submissions by the parties, pursuant to the Montgomery County Code, § 2A-7(a). The Appellant appeared *pro se*. Associate County Attorney Charles L. Frederick represented Montgomery County.

Pursuant to the County Code, § 2A-8 and Board Rule 3.2, the County submitted a Motion to Dismiss the administrative appeal. The Board, pursuant to Board Rule 3.2.5, decided the Motion for Summary Disposition at the prehearing conference on November 30, 2016.

Decision of the Board:

Motion for Summary Disposition granted; administrative appeal dismissed.

Case No. A-6508 Page 2

RECITATION OF FACTS

The Board finds, based on undisputed evidence in the record, that:

Appellant was issued civil citation number 5Z36217046 by Officer Terence L. Rhodes, DHCA Code Inspector, on October 5, 2016, for failure to eliminate a public nuisance on the Property, a violation of § 26-9(a)(12) of the County Code. See Exhibit 3(a). The public nuisance identified on the civil citation was a "hazardous tree limb which is stated in Davey's Arborist Co. report." See Exhibit 3(a).

MOTION FOR SUMMARY DISPOSITION—SUMMARY OF ARGUMENTS

- 1. Counsel for the County argued that the Appellant in this case has brought this appeal to the wrong venue. He argued that § 2-112 of the County Code does not provide the Board with jurisdiction to review a violation of Chapter 26 of the County Code, under which Appellant was issued civil citation number 5Z36217046. He explained that the civil citation has a trial date of January 24, 2017 in the Montgomery County district court, which is the proper venue to hear Appellant's arguments against issuance of the citation. Because the Board does not have subject matter jurisdiction to review DHCA's issuance of a citation under Chapter 26 of the County Code, he argued that the Board should dismiss this appeal.
- 2. Appellant argued that she was requesting that the civil citation be dismissed as arbitrary and capricious. She explained that she was trying to keep the matter at the administrative level and out of the courts.

CONCLUSIONS OF LAW

- 1. Section 2-112(c) of the Montgomery County Code provides the Board of Appeals with appellate jurisdiction over appeals taken under specified sections and chapters of the Montgomery County Code.
- 2. Section 2A-2(d) of the Montgomery County Code provides that the provisions in Chapter 2A govern appeals and petitions charging error in the grant or denial of any permit or license or from any order of any department or agency of the County government, exclusive of variances and special exceptions, appealable to the County Board of Appeals, as set forth in Section 2-112, Article V, Chapter 2, as amended, or the Montgomery County Zoning Ordinance or any other law, ordinance or regulation providing for an appeal to said Board from an adverse governmental action.

- 3. The Annotated Code of Maryland, Courts and Judicial Proceedings Article, § 4-401(10) provides that the district court has exclusive original civil jurisdiction over "[a] proceeding for adjudication of [a] municipal infraction..."
- 4. Under Section 2A-8 of the Montgomery County Code, the Board has the authority to rule upon motions and to regulate the course of the hearing. Pursuant to that section, it is customary for the Board to dispose of outstanding preliminary motions prior to the hearing. Board Rule 3.2 specifically confers on the Board the ability to grant Motions to Dismiss for Summary Disposition in cases where there is no genuine issue of material fact and dismissal should be rendered as a matter of law (Rule 3.2.2).
- 5. The Board finds that any controversy concerning DHCA's issuance of a civil citation to Appellant for a violation of Chapter 26 of the County Code does not involve any genuine issue of material fact to be resolved by the Board. Rather, the Board finds that the controversy surrounding DHCA's issuance of civil citation number 5Z36217046 is not a controversy for which the Board has appellate jurisdiction, and that a hearing on the merits of the issuance of this citation is scheduled to be heard by the Montgomery County district court on January 24, 2017. The Board finds that dismissal should be rendered as a matter of law.
- 6. The Motion for Summary Disposition in Case A-6508 is granted, and the appeal in Case A-6508 is consequently **DISMISSED**.

On a motion by Member Edwin S. Rosado, seconded by Member Stanley B. Boyd, with Chair Carolyn J. Shawaker, Vice Chair John H. Pentecost, and Member Bruce Goldensohn in agreement, the Board voted 5 to 0 to dismiss the administrative appeal and adopt the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

Carolyn J. Shawaker

Chair, Montgomery County Board of Appeals

Entered in the Opinion Book of the Board of Appeals for

Montgomery County, Maryland this 19th day of December, 2016.

Barbara Jay

Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure (see Section 2-114 of the County Code).